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No. 99-2036

Supreme Court
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IN THE SUPREME COURT OF THE UNITED STATES

The Good News Club, et al.,
Petitioners,

v.

Milford Central School,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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13 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTEREST OF THE AMICUS CURIAE.....1

ARGUMENT 4

THE MILFORD SCHOOL DISTRICT'S RESTRICTION IS UNREASONABLE, AND THEREFORE UNCONSTITUTIONAL, BECAUSE A PUBLIC SCHOOL MAY NOT EXCLUDE SPEECH SO AS TO AVOID AN "IMPRESSION" OF "ENDORSEMENT OF RELIGION" THAT IS, IN FACT, FALSE

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Board of Education of Westside Community Schools (District 66) v. *Mergens*, 496 U.S. 226 (1990) 6, 7, 8

Bronx Household of Faith v. *Community School District No. 10*, 127 F.3d 207 (2nd Cir. 1997) 5, 6, 8

Cornelius v. *NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985) 4

Deeper Life Christian Fellowship v. *Board of Education of the City of New York*, 852 F2d 681 (2nd Cir. 1988) 8

Good News/Good Sports Club v. *School District of Ladue*, 28 F.3d 1501 (8th Cir. 1994) 8

Hedges v. *Wauconda Community School District 118*, 9 F.3d 1295 (7th Cir. 1993) 7

Lamb's Chapel v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993) 4, 5, 6, 7, 9

Rosenberger v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995) 4, 6

Sherman v. *Community Consolidated School District 21*, 8 F.3d 1160 (7th Cir. 1993) 8

Trietley v. *Board of Education of the City of Buffalo*, 65 A.D. 2d 1, 409 N.Y.S. 2d 912 (4th Dept. 1978) 9

Widmar v. *Vincent*, 454 U.S. 263 (1981) 6

OTHER AUTHORITIES

New York Education Law §414 9

INTEREST OF THE AMICUS CURIAE[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States.

COLPA submits this *amicus* brief on behalf of, and is joined by, the following national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada – The oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America – The nation's largest grassroots Orthodox Jewish organization, with chapters and affiliated congregations in numerous Jewish communities throughout the United States and Canada. Among its other activities, Agudath Israel sponsors adult education programs and youth gatherings on Jewish religious themes.

- National Council of Young Israel – A coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

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[1] No party or party's counsel authored this brief in whole or in part and no person or entity other than the amicus curiae, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. See Rule 37.6.

- The Rabbinical Alliance of America – An Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

- The Rabbinical Council of America – The largest Orthodox Jewish rabbinical organization in the world with a membership that exceeds one thousand rabbis. The organization is deeply involved in issues related to religious freedom.

- Torah Umesorah-National Society for Hebrew Day Schools – The coordinating body for more than 600 Jewish Day schools across the United States and Canada.

- The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") – The largest Orthodox Jewish synagogue organization in North America with over one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

The burgeoning of the Orthodox Jewish population in many areas of this country over the past several decades has led to the establishment of a great many new congregations and an exponential increase in the membership of existing ones. This has given rise, in turn, to an increasingly frequent scenario in which school districts are approached with a request for the temporary use of their buildings on Friday evenings and Saturdays by either newly formed congregations that have no permanent home as of yet or established synagogues that are undergoing structural expansions or repairs.

In addition, community-wide lectures and symposia of a religiously inspirational or educational nature are prominent features of Orthodox Jewish communal life. The sponsors of these gatherings often seek to hold them in local public schools during non-school hours. In many instances these are the only neighborhood-based facilities capable of accommodating the large turnouts these events draw.

The availability of public school facilities at times when they are not in use for academic instruction for these types of religious services and programs is especially necessary on the Jewish Sabbath and Holidays, when travel by car is religiously prohibited by Jewish law. Thus, to take but one common example, when an Orthodox congregation is temporarily unable to use its synagogue building because of repairs or because it has been damaged by a fire or a natural disaster, its congregants will not be able to attend Sabbath services – a central component of Jewish religious life – unless an alternate facility is available to them within walking distance. Often the only facility available in the proximate vicinity is the local public school building. Hence the Orthodox Jewish community has a special stake in ensuring that public school facilities are accessible to religious groups for religious gatherings.

This case presents an opportunity for the Court to clarify the constitutionality of the use of governmental property by private groups not only for educational programs with religious content, but also for explicitly religious purposes like communal worship services that address the spiritual and social needs of communities like ours. We respectfully make this *amicus curiae* presentation, upon the consent of the parties, to express our view that the Free Speech Clause of the United States Constitution mandates that access to public facilities when they are not being utilized for their public purpose must be granted equally to those wishing to utilize such areas for the full range of religious practice.

ARGUMENT

THE MILFORD SCHOOL DISTRICT'S RESTRICTION IS UNREASONABLE, AND THEREFORE UNCONSTITUTIONAL, BECAUSE A PUBLIC SCHOOL MAY NOT EXCLUDE SPEECH SO AS TO AVOID AN "IMPRESSION" OF "ENDORSEMENT OF RELIGION" THAT IS, IN FACT, FALSE

The majority of the Second Circuit panel below concluded that the Milford Central School District's policy prohibiting use of school premises "for religious purposes" was not unreasonable and did not amount to viewpoint discrimination. 202 F.3d at 509-511. We join in the view elaborated in the briefs of petitioners and other *amici* that the distinctions drawn by the between various forms of religious expression are not only unduly artificial and ill-defined, but result in the very kind of entanglement of government and religion that the Religion Clauses are designed to obviate.

Denial of access such as that at issue extends beyond the question of viewpoint discrimination, however, and must also be tested by a standard of reasonableness. See *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 829 (1995); *Cornelius* v. *NAACP Legal Defense & Education Fund*, 473 U.S. 788, 806 (1985). This issue received short shrift in the decision below but merits closer consideration; it will be the exclusive focus of this *amicus* presentation.

In *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), this Court struck down a New York school district's rule barring religious uses of school property as applied to an evangelical church's film

presentation on family values from a Christian perspective. The Court noted that the Second Circuit, which had upheld the school district, had "uttered not a word in support of its reasonableness holding. . . . If [the rule] were to be held unreasonable, it could be held facially invalid, that is, it might be held that the rule could in no circumstances be applied to religious speech or religious communicative conduct." *Id.* at 391 n. 6.

In *Bronx Household of Faith* v. *Community School District No. 10*, 127 F.3d 207 (2nd Cir. 1997), Circuit Judge Miner – who had authored the Second Circuit's decision in *Lamb's Chapel*, and who also wrote the opinion in this case – sustained a New York City school district's refusal to allow a church group to use a public school facility for religious worship services. In his *Bronx Household* opinion, Judge Miner said (127 F.3d at 214):

> We were faulted in *Lamb's Chapel* for "utter[ing] not a word in support of [our] reasonableness holding," *Lamb's Chapel*, 508 U.S. at 393 n. 6, in regard to the regulation in that case. We think that it is reasonable in this case for a state and a school district to adopt legislation and regulations denying a church permission to use school premises for regular religious worship. We think that it is reasonable for state legislators and school authorities to avoid the identification of a middle school with a particular church. We think that it is reasonable for these authorities to consider the effect upon the minds of middle school children of designating their school as a church. And we think that it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises for regular church services. Education, after all, is a particularly important state

> function, and the use of school premises is properly a matter of particular state concern. Finally, it is certainly not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school in New York City.

In this case Judge Miner upheld the argument that it was reasonable for the Milford School District to "ensur[e] that students in its charge are not left with the impression that [it] endorses religious instruction in its school, or that it advances the beliefs of a particular religion or group thereof." He cited his earlier opinion in *Bronx Household* as precedent that "foreclosed" any contrary result. 202 F.3d at 509.

In fact, this Court has rejected the rationale upon which Judge Miner has now relied twice. It has held that a *false* "impression" that the public may have that government is "endorsing" private religious expression is not a reason to discriminate against speech or religion. In *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981), the Court expressly rejected the notion that the need to prevent a perception of establishment justified barring the use of school property by religious groups. The Court has reiterated its view that "schools do not endorse everything they fail to censor" (*Lamb's Chapel*, 508 U.S. at 396), in a series of decisions involving the use of public property or funding for religious purposes. See *Board of Education of Westside Community Schools (District 66)* v. *Mergens*, 496 U.S. 226, 250 (1990); *Lamb's Chapel, supra*; *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 841 (1995).

So long as the conditions under which public property is used reflect governmental neutrality, its use for religious purposes is permissible. When religious uses occur after school hours and are open to the public, and the premises are similarly used by a broad array of private secular groups,

"the posited fears of an Establishment Clause violation are unfounded." *Lamb's Chapel*, 508 U.S. at 395.

The constitutionally protected religious speech of a private group such as the petitioner should not be sacrificed to a governmental authority's speculative concern about a possible *mis*impression that might be harbored by some students or members of the public. Error and falsity are not grounds for suppressing speech or religion. As a plurality of this Court stated in *Capitol Square Review and Advisory Board* v. *Pinette*, 515 U.S. 753, 765-66 (1995), "given an open forum and private sponsorship, erroneous conclusions [of state endorsement] do not count . . . . Private religious speech cannot be subject to veto by those who see favoritism where there is none."

Moreover, there are steps a school district can take to avoid even the mistaken impression of endorsement. This Court recognized as much in *Board of Education* v. *Mergens*, 496 U.S. 226,251 (1990): "To the extent a school makes clear that its recognition of [a religious club] is not an endorsement of the views of the club's participants, . . . students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech." The Seventh Circuit has observed that the "proper response is to educate the audience rather than squelch the speaker" – particularly so in a school setting, since "[d]ealing with misunderstandings – here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement – is . . . what schools are for." *Hedges* v. *Wauconda Community School District 118*, 9 F.3d 1295, 1299 (7th Cir. 1993).

The ability of students of elementary, junior and senior high school ages alike to differentiate between government-sponsored speech and privately sponsored speech that is permitted by government in a public or limited

public forum has been acknowledged by various courts in cases involving after-hours religious activities for students at the public schools they attend. See *Sherman* v. *Community Consolidated School District 21*, 8 F.3d 1160 (7th Cir. 1993) (elementary school); *Good News/Good Sports Club* v. *School District of Ladue*, 28 F.3d 1501 (8th Cir. 1994) (junior high school); *Mergens*, *supra*, 496 U.S. at 250 (senior high school).

These decisions repudiate the Second Circuit's view in *Bronx Household* that "it is reasonable for [state legislators and school authorities] to consider the effect upon the minds of middle school children of designating their school as a church" (127 F.2d at 214) and its consequent conclusion in this case that it was "eminently reasonable" for Milford to close its public school buildings to the Good Faith Club for fear of "communicat[ing] to students of other faiths that they were less welcome than students who adhere to the Club's teachings." 202 F.3d at 509.

In the instances that concern this *amicus*, as elaborated at pages 2-3 *supra*, the contemplated worship services or religious instruction take place in the evenings or on weekends. The participants are members of the general population. Under these circumstances, even the attenuated link between school and religion that might be thought to be present in the context of an after-school religious club for students is non-existent. See *Deeper Life Christian Fellowship* v. *Board of Education of the City of New York*, 852 F2d 681, 686 (2d Cir. 1988). To the extent that the Milford policy purports to prohibit *all* religious uses of public school buildings – even evening and weekend uses that are not targeted toward students – the policy clearly extends far beyond anything that might remotely be considered reasonable.

Finally, we note that this is the second time in less than a decade that this Court is being called upon to address

a New York school district's policy concerning religious uses of public school facilities. It is noteworthy that the state statute upon which the Milford policy is based (and upon which the challenged policy in *Lamb's Chapel* was based), New York Education Law §414, is silent with respect to religious uses.

That statutory silence was interpreted in *Trietley* v. *Board of Education of the City of Buffalo*, 65 A.D. 2d 1 (4th Dept. 1978), as flatly prohibiting religious uses of public school property. Under this state court reading of the statute, New York's legislature has opened public schools to many and diverse uses, but not all. Among the permissible uses of these sites are those that are for the purpose of "instruction in any branch of education, learning or the arts" and, more broadly, "other uses pertaining to the welfare of the community." N.Y. Education Law § 414 (1)(a), (c).. *Trietley*, however, apparently did not regard the study of religion as a "branch of education [or] learning" such that it would come within the ambit of §414(1)(a). Nor was that decision prepared to recognize that a worship service could be seen by its sponsors as redounding to the "welfare of the community" on a par with the social, civic and recreational meetings and entertainments referred to in §414 (1)(c).

Trietly's reading of the statute to prohibit any and all religious uses of public school facilities is plainly inconsistent with *Lamb's Chapel,* which was decided 15 years after *Trietly*. *Trietly's* gloss on Section 414 renders the statute facially unconstitutional – as this Court noted in *Lamb's Chapel*, *supra*, 508 U.S. at 391 n.6 Hence the statute's constitutionality can be saved only if this Court reads Section 414 as permitting religious uses including religious instruction and worship.

The ongoing confusion surrounding religious uses of public school facilities in New York should lead the Court to address the underlying statute head on – either by declaring it

unconstitutional, or by reading it in a manner that comports with constitutional principle.

CONCLUSION

For the foregoing reasons, COLPA respectfully submits that the Milford Central School District's policy with respect to religious usage of public school facilities and the New York statute upon which the policy is based do not meet the test of reasonableness. It may not constitutionally be applied to private groups seeking to use public school buildings in the evenings and on weekends for religious activities targeted at members of the community at large, rather than at students. The 2-1 decision of the Second Circuit panel below should be reversed.

Respectfully submitted,

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